Keruntum Sdn Bhd v The Director of Forests & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–325 OF 2010
RAMLY ALI FCJ, MOHTARUDIN BAKI AND DAVID WONG JJCA
22 JANUARY 2015

Limitation — Public Authorities Protection Act 1948 — Action against public authorities — Public misfeasance in public office — Revocation of timber licence — Whether there was breach — Limitation period of 36 months for claim public authority — Whether claim time-barred — Sarawak Limitation Ordinance (Cap 49) Item 19 — Sarawak Forests Ordinance ss 2(2) & 51A

In 1983, the appellant had successfully obtained a timber licence ('the licence') for a period of 25 years with the conditions that the licence was not transferrable; and the appellant could not allot, issue or register the transfer of any shares of the appellant without prior consent of the Sarawak Timber Development Corp ('STIDC'). In 1983, the shareholders of the appellant transferred all their shareholdings to third parties and the shares in the appellant were issued to two others. When the licence was issued in 1983 and the time when the transfers of shares were done in the appellant, no consent was obtained from the Director of Forests ('DW7') as required by s 2(2) of Sarawak Forests Ordinance ('the Ordinance'). The appellant then received a letter from DW7 informing it that its licence had been revoked ('the first revocation'). However, the first revocation was quashed by the High Court. The appellant's sole contention was that the decision to revoke the timber licence was politically motivated. Subsequently, s 2(2) of the Ordinance was amended and a new s 51A of the Ordinance which became effective on 1 January 1988 was inserted. Dissatisfied with the appellant's explanation, the Minister cancelled the licence ('the second revocation'). The appellant contended that the second revocation amounted to misfeasance in public office and proceeded to file this suit and sought for declaratory reliefs in respect of the two revocations. The High Court dismissed the plaintiff's claim and hence the present appeal.

Held, dismissing the appeal with costs RM 30,000:

(1) The revocation date for the first revocation was the date of the letter issued by DW7 which was 11 March 1987 while the suit was filed on 31 July 1990. Under s 2(a) of the Public Authorities Protection Act 1948 stipulates that any action against any person exercising a public duty must be done within 36 months from the date of the act complained of or, in the case of a continuance of injury or damage, within 36 months

next after the ceasing thereof. Item 19 of the Ordinance provides that a limitation period of two years for suit claiming for compensation for any malfeasance, misfeasance or nonfeasance, independent of contract and such period to commence from the act of misfeasance. The relief in respect of the first revocation was time barred by four months (see para 23).

(2) The licence given to the appellant was subject to s 2(2)(b) of the Ordinance. There was indeed a transfer of shares without the consent of the second respondent. There was a continuing breach by the appellant of s 2(2)(b) of the Ordinance. Section 2(2) of the Ordinance expressly prohibits any transfer without the consent of DW7 and non-compliance of the same tantamount to an illegal act. Public policy dictated that the appellant could not premise its action on a licence tainted with illegality (see para 28(e) & 58).

[Bahasa Malaysia summary

Pada tahun 1983, perayu telah berjaya memperolehi lesen pembalakan ('lesen') untuk tempoh selama 25 tahun dengan syarat bahawa lesen tersebut tidak dipindahkan; dan perayu tidak dapat umpukkan, keluarkan atau daftarkan pemindahan apa-apa saham perayu tanpa kebenaran terlebih dahulu daripada Sarawak Timber Development Corp ('STIDC'). Pada tahun 1983, pemegang-pemegang saham perayu memindahkan kesemua pegangan saham mereka kepada pihak ketiga dan saham-saham dalam perayu dikeluarkan kepada dua orang yang lain. Apabila lesen dikeluarkan pada tahun 1983 dan pada masa apabila pemindahan saham-saham dilakukan dalam perayu, tiada kebenaran diperolehi daripada Pengarah Perhutanan ('DW7') seperti yang dikehendaki oleh s 2(2) Ordinan Perhutanan Sarawak ('Ordinan'). Perayu kemudiannya menerima surat daripada DW7 memberitahunya bahawa lesennya telah dibatalkan ('pembatalan'). Walau bagaimanapun. Pembatalan pertama dibatalkan oleh Mahkamah Tinggi. Satu-satunya hujahan perayu adalah bahawa keputusan untuk membatalkan lesen pembalakan tersebut adalah bermotifkan politik. Kemudiannya, s 2(2) Ordinan dipinda dan s 51A Ordinan yang baru yang berkuat kuasa pada 1 Januari 1988 dimasukkan. Tidak berpuas hati dengan penjelasan perayu, Menteri membatalkan lesen tersebut ('pembatalan kedua'). Perayu berhujah bahawa pembatalan kedua merupakan misfeasans di pejabat awam dan meneruskan untuk memfailkan guaman ini dan memohon relief perisytiharan berkaitan kedua-dua pembatalan tersebut. Mahkamah Tinggi menolak tuntutan plaintif dan maka rayuan ini.

Diputuskan, menolak rayuan dengan kos RM 30,000:

(1) Tarikh pembatalan untuk pembatalan pertama adalah tarikh surat dikeluarkan oleh DW7 yang mana adalah 11 Mac 1987 sementara guaman difailkan pada 31 Julai 1990. Di bawah s 2(a) Akta Perlindungan

Pihak Berkuasa Awam 1948 menyatakan bahawa apa-apa tindakan terhadap mana-mana orang yang menjalankan tugas awam mesti dijalankan dalam masa 36 bulan dari tarikh tindakan yang diadukan atau, dalam kes kecederaan berterusan atau ganti rugi, dalam masa 36 bulan selepas tamatnya. Item 19 Ordinan memperuntukkan bahawa tempoh selama dua tahun untuk guaman menuntut pampasan bagi apa-apa kejahatan misfeasans atau ketakpatuhan, bebas daripada kontrak dan tempoh sedemikian bermula daripada tindakan misfeasans. Relief berkaitan pembatalan pertama adalah dihalang masa selama empat bulan (lihat perenggan 23).

(2) Lesen yang diberikan kepada perayu adalah tertakluk kepada s 2(2)(b) Ordinan. Memang terdapat pemindahan saham tanpa kebenaran responden kedua. Terdapat kemungkiran berterusan oleh perayu terhadap s 2(2)(b) Ordinan. Seksyen 2(2) Ordinan secara nyata melarang apa-apa pemindahan tanpa kebenaran DW7 dan ketidakpatuhan terhadapnya merupakan kepada tindakan salah di sisi undang-undang. Polisi awam menetapkan bahawa perayu tidak dapat mendasarkan tindakannya atas lesen yang dicemar dengan kepenyalahan undang-undang (lihat perenggan 28(e) & 58).]]

Notes

For cases on actions against public authorities, see 9 *Mallal's Digest* (4th Ed, 2014 Reissue) para 2497.

Cases referred to

Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd [2014] 3 MLJ 785; [2014] 3 CLJ 73, FC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)

Wasakah Singh v Bachan Singh [1931] 1 MC 125 (refd)

Legislation referred to

Federal Constitution art 8, 8(1)

Public Authority Protection Act 1948 s 2(a)

Sarawak Forests Ordinance 1948 ss 2(2), 2(2)(a), (b), (c), (d), 51A, 51A(3)

Sarawak Limitation Ordinance (Cap 49) Item 19

Appeal from: Civil Trial Suit No. KG 123 OF 1990 (High Court, Kuching)

Colin Lau (Michael Ong & Chang) for the appellant.

Nik Syahril Nik Ab Rahman (Lonie ak Pinda with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

David Wong JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court of Kuching dismissing the appellant/plaintiff's claim against the respondents/ defendants. The appellant's claims in substance concern declaratory reliefs in respect of two revocations of a timber licence issued to the appellant by the second respondent and general damages for breach of contract and in tort of 'misfeasance in public office'.

[2] We, after hearing submissions, dismissed the appeal with costs and now give our grounds of judgment.

BACKGROUND FACTS

[3] The background facts have been set out in details by the learned judge and we adopt them. In this judgment we only set out the salient parts of the same.

[4] The appellant through its director Hj Mohd Louis Ali had on 27 July 1982 applied to the then Minister of Forestry Datuk Hj Nor Tahir for a timber licence and the application was approved on 19 July 1983 by the minister. A Forest Licence T/0279 ('Licence') was then issued to the appellant by the then Director of Forests. The licence was for a period of twenty five years from 10 October 1983 to 9 October 2008 and for an area of 188,926 hectares.

[5] The conditions attached to the licence were these:

(a) cl 15 of the licence stated that 'Before any logging contracts are awarded, prior approval should be obtained from the Director of Forests and from the corporation'.

(b) cl 31 stated that 'This licence is not transferrable'.

(c) the licence incorporated a sixth schedule which formed an agreement between the appellant and Sarawak Timber Development Corporation or STIDC and clause (xi) of the aforesaid schedule provides that 'the appellant shall not allot, issue or register the transfer of any shares of the appellant without the prior consent of STIDC, which consent shall not be unreasonably withheld'.

[6] The shareholders of the appellant at the time of the issuance of the licence were Hj Deli Abdul Rahman (Hj Deli) and Hj Louis Ali (Hj Louis). However on 14 December 1983, both Hj Deli and Hj Louis at the behest of PW5 (Norlia Abdul Rahman) transferred all their shareholdings to Solana Sdn

Bhd. The evidence also shows that at the same time shares in the appellant were issued to two others with the following shareholding status in the appellant:

Temenggong Baya Malang	500 shares
POU (Baram) Sdn Bhd	2,500 shares
Solana Sdn Bhd	6,998 shares
Total shareholdings.....	9,998 shares

[7] On 5 July 1984 another issuance of shares took place in Solana Sdn Bhd with the result that Lembaga Amanah Kebajikan Melayu Miri, Lembaga Amanah Kebajikan Darul-Falah (BINA), Anib Plantations Sdn Bhd, Crista Holdings Sdn Bhd, Polycarp Enterprise Sdn Bhd, Hj Louis Ali, Hj Deli and Datuk Shabuddin Mat becoming shareholders in Solana Sdn Bhd.

[8] It is undisputed that when the licence was issued in 1983 and the time when the just mentioned transfers of shares in the appellant and Solana Sdn Bhd, no consent was obtained from the Director of Forests as required by s 2(2) of the Sarawak Forests Ordinance which reads as follows:

> Where a licence or permit is, under this Ordinance, declared not to be transferable, the licence or permit shall, unless the conservator or a person authorised by him in that behalf directs, be invalid if:
>
> (a) the holder thereof transfers the licence or permit;
>
> (b) in the case of a licence or permit issued to a company, the controlling shares in the country are transferred;
>
> (c) in the case of a licence or permit issued to a partnership, there is a change, save by operation of law, in the partnership; or
>
> (d) the holder thereof enters into an agreement with any other person, the effect of which is to enable the benefits conferred by the licence or permit to be enjoyed by any other person.

[9] To regularise the transfers, the appellant on 6 September 1985 wrote to the Director of Forests to obtain his consent for the transfers of shares to Temenggong Baya Malang, POU (Baram) Sdn Bhd and Solana Sdn Bhd The appellant had also on 5 January 1984 wrote to STIDC requesting the same consent but no reply was forthcoming until 1 October 1985 when the secretary/legal officer of the STIDC, one Zakaria Kawi, informed the appellant that since the allottees were members of the appellant before the appellant accepted STIDC's letter of offer, STIDC's consent was not necessary.

[10] Despite the letter from Zakaria Kawi, the board of STIDC had considered the appellant's application for consent and had decided to refer that application to the Minister of Resource Planning for decision.

[11] On or about mid 1986, the appellant had obtained permits to enter the area to start logging operations and had entered into a contract for logging with one Maludan Sdn Bhd on 9 February 1985.

[12] On 11 March 1987, the appellant received a one sentence letter from the then Director of Forests ('DW7') informing it that its licence had been cancelled and revoked ('first revocation'). As a result of the letter of cancellation, the appellant took legal remedy through suit KG5/1987 to quash the revocation of licence decision of the director. Prior to the hearing of that suit, the appellant received a letter from the then director informing it that the reason for the revocation of the licence was the failure to comply with s 2(2) of the Forest Ordinance in appointing Maludan as logging contractor and transferring of controlling shares in the appellant without the consent of the Director of Forest.

[13] It is undisputed that the appellant's sole stand on this dispute was that the decision to revoke the timber licence was politically motivated. This related to what is known in the Sarawak political history as the 'Ming Court Affair' which occurred in March 1987. What had happened was that Tun Abdul Rahman (PW9) led a group of State Assemblymen of the Sarawak Legislature and their allies to topple the Minister of Resource Planning who was then the Chief Minister of Sarawak. That attempt failed as the Chief Minister dissolved the State Legislative Assembly and caused an election which the Chief Minister and his party were returned as the government of the State.

[14] However, the appellant succeeded on the legal front when the High Court Kuching quashed the revocation of the Minister of Resources Planning and on appeal to the then Supreme Court, Salleh Abbas LP held that the Minister of Resources Planning had failed to abide by the 'principle of fairness and prudent administration' to allow the appellant to make representation as to why its licence should not be cancelled.

[15] In view of the decision of the High Court Kuching, the Sarawak State Legislative Assembly amended s 2(2) and inserted a new s 51A of the Forest Ordinance which became effective on 1 January 1988. The amended s 2(2) and s 51A read respectively as follows:

Section 2(2):

> Where a licence or permit is, under this Ordinance, declared not to be transferable, the licence or permit shall, unless, the Director or a person

authorized by him in that behalf otherwise directs, be liable to be cancelled or suspended in accordance with section 51A if-

(1) the holder thereof transfers the licence or permit;

(2) in the case of a licence or permit issued to a company the controlling shares in the company are transferred;

(3) in the case of a licence or permit issued to a partnership, there is a change, save by operation of law, in the partnership; or

(4) the holder thereof enters into an agreement with any other person, the effect of which is to enable the benefits conferred by the licence or permit to be enjoyed by any other parties.

Section 51A:

(a) the holder of the licence or permit has failed to pay royalties, premia, fees, or cess as stipulated in the licence or permit;

(b) the holder of the licence or permit has failed to pay royalties, premia, fees, or cess as stipulated in the licence or permit;

(c) the holder of the licence or permit has failed to comply with any conditions specified in the licence or permit;

(d) the holder of the licence or permit has failed to comply with the written directions given by the Director;

(e) the holder of the licence or permit has transferred or assigned his licence or permit without the authorization of the Director under section 2(2) or section 2A;

(f) the holder of the licence or permit has ceased to operate in the area in respect of which the licence or permit was issued;

(g) it is advisable in the public interest, for a special reason, to do so; or

(h) the holder of the licence or permit has contravened the provisions of section 51A relating to compulsory insurance.

(2) The Minister shall before cancelling or suspending any licence or permit under subsection (1), give the holder of the licence or permit notice in writing of his intention to do so and calling upon the person concerned to show cause to him why such licence or permit should not be cancelled or suspended, as the case may be.

[16] On 4 April 1988, the Minister through the permanent secretary and following the procedure laid down in s 51A of the Forest Ordinance wrote to the appellant seeking explanation as to why its licence should not be revoked in view of the continuing breaches of s 2(2)(b) of the Forest Ordinance. The appellant on 3 May 1988 replied and requested for the right of oral hearing and arbitration as provided under the licence.

[17] The Minister was not satisfied with the explanation and through

Permanent Secretary of the Ministry of Resource Planning informed the same to the appellant and accordingly cancelled the licence ('Second Revocation').

[18] Though the appellant was accorded the right of appeal to the Majlis Mesyuarat Kerajaan Negeri under s 51A(3) of the Forest Ordinance against the second revocation, it did not do so as it was of the opinion that there would not be a fair hearing as the second revocation was politically motivated and done in bad faith. It was the appellant's contention that the Minister of Resource Planning that the second revocation amounted to misfeasance in public office. Further the appellant had contended that s 51A of the Forest Ordinance was unconstitutional as it contravened art 8 of the Federal Constitution.

[19] Subsequent to the second revocation, the licensed area of the licence was divided up into four parts and licences were issued to three other companies, including PPES Resorts Sdn Bhd which is a company owned by the Sarawak Economic Development Corporation (SEDC).

[20] In view of the second revocation, the appellant filed this suit to seek for declaratory reliefs in respect of the two revocations.

High Court decision:

[21] The learned High Court judge came to his decision based on his findings on the following issues:

(1) Whether the plaintiff's claim in respect of the first revocation is statute-barred by reason of the Public Authorities Protection Act ('PAPA') and/or the provisions of the Sarawak Limitation Ordinance?

Ans: Yes

(2.1) Whether there had been breach or contravention of s 2(2) of the Forests Ordinance by the plaintiff in having allowed its controlling shares to be transferred without authorization of the Director of Forests or a person authorized by him in that behalf?

Ans: Yes

(2.2) If there was such breach, whether the licence was rendered invalid and/or tainted with illegality?

Ans: Yes

(3.1) Whether the first and second revocation were unlawful or contrary to law and should be set aside?

Ans: No

(3.2) Was the revocation of the plaintiff's timber licence done to serve a political purpose?

Ans: No

(4) Whether s 51A of the Forests Ordinance (as amended) is ultra vires art 8(1) of the Federal Constitution?

Ans: No

(5) If the court finds in favour of the plaintiff's claim for compensation, damage or loss, what is the quantum thereof?

Not applicable in view of the above findings.

[22] Having perused the memorandum of appeal and the submissions made by respective counsel, it was our view that this appeal can be dealt with by deliberating on the same issues as was done by the learned judge but of course in the capacity as an appellate tribunal.

COURT ANALYSIS:

Issue 1:

[23] Whether the appellant's claim in respect of the first revocation is statute-barred by reason of the Public Authorities Protection Act ('PAPA') and/or the provisions of the Sarawak Limitation Ordinance?

To recap, the appellant's cause of action concerned the first respondent's alleged tort of public misfeasance in public office and also for the breach of contract in terminating the licence without the requisite three months notice.

The undisputed revocation date for the first revocation is the date of the letter issued by DW7 (the Director of Forestry) which was 11 March 1987. The other date of significance is the date of filing this suit and that was 31 July 1990.

The respondents relied on s 2(a) Public Authority Protection Act (PAPA) which stipulates that any action against any person exercising a public duty must be done within thirty six months from the date of the act complained of or, in the case of a continuance of injury or damage, within thirty six months next after the ceasing thereof. Item 19 of the Sarawak Limitation Ordinance was also relied upon by the respondents as that item provides that a limitation period of two years for suit claiming for compensation for any malfeasance, misfeasance or nonfeasance, independent of contract and such period to commence from the act of misfeasance.

[24] Applying the facts to the law, the respondents submitted that the relief in respect of the first revocation is time barred by some four months.

[25] In rebuttal, the appellant submitted that there was a continuing breach on the part of the first respondent when the appellant was prevented from

entering the area after its victory in the earlier suit in the High Court. The proper date for the limitation period to run was thus on 10 August 1987 which was the date in which the High Court quashed the first revocation.

[26] The learned judge sustained the contention of the respondents and this is what he said:

> In my judgment, the cause of action in this case is more akin to accident cases where the negligent act of a driver in knocking down a victim is a single act which gives rise to or constitutes a complete cause of action from the date when the accident occurs, even though the injurious effects of the accident may continue, but does not extend the period of limitation. It is for this reason I find the facts here more akin to the case of *Baltim Timber Sdn Bhd v Director of Forests & Ors* [1996] 4 MLJ 103 where the timber licence was revoked on the same date as the licence in this case, and where the High Court Kuching applied s 2(a) of the PAPA and held that time began to run from the date of the act of revocation of Baltim's Licence. The Court of Appeal subsequently upheld the decision of the High Court. For all the above reasons, I find that the plaintiff's claim in tort on the first revocation is time barred and should be dismissed.

We have no reason to disagree with the learned judge for the simple reason he had applied the facts and the law correctly.

[27] As for the cause of action on contract, the learned judge held that this claim cannot be sustained as the appellant had breached the Forestry Ordinance when he was dealing with issue 2.2. Similarly we will discuss the learned judge's grounds when we deal with issue 2.2.

Issue 2.1:

Whether there had been breach or contravention of s 2(2) of the Forests Ordinance by the appellant in having allowed its controlling shares to be transferred without authorisation of the Director of Forests or a person authorised by him in that behalf?

[28] In dealing with this issue the learned judge had made certain findings of law and they are these:

(a) the licence given to the appellant is subject to s 2(2)(b) of the Forests Ordinance.

(b) the Director of Forestry possessed the power to grant consent or authorisation for events set out in ss 2(2)(a) – (d) of the Forests Ordinance.

(c) there was no abdication of power by the Director of Forestry to the Minister of Resources Planning under the then new s 51A.

(d) there was no misreading of the judgments of High Court and Supreme Court by the respondents in the earlier suit in respect of the concession that there was indeed a transfer of shares 'without the consent of the 2nd respondent'.

(e) there was a continuing breach by the appellant of s 2(2)(b) of the Forests Ordinance.

We had carefully considered the analysis of the learned judge's rulings and are of the view that he had applied the law to the undisputed facts correctly and he had given credible reasons for his decision. We also feel that there is no necessity for us to set out those reasons in this judgment as it would be an exercise in verbosity and duplicity. The reasons of the learned High Court Judge are found at pp 85–96 of part A of the record of appeal.

[29] The remaining subsidiary issues dealt by the learned judge are the allegation of a general plan and oral agreement by the appellant through Tun Abdul Rahman and the consent for the transfer of shares given by STIDC via a letter dated 1 October 1985. As these two issues concerned appreciation of testimonies of witnesses plus the fact that one of main ground of the appeal was that the learned judge failed to properly appreciate the totality of the oral and documentary evidence before him, we deem it fit to spend some time on these two issues.

[30] It was the contention of the appellant that there was no breach of s 2(2) of the Forestry Ordinance as the transfer of shares to Solana Sdn Bhd was done pursuant a general plan to assist charitable bodies or organisations, individuals and the local inhabitants, namely the Orang Ulu of the Baram area and that general plan formed part of the oral agreement with the then Minister of Finance representing himself, first respondent and third respondent, when he approved the licence to the appellant.

[31] Before we analyse the learned judge's analysis of the evidence, we should mention that learned counsel for the appellant from the outset of his submission contended that the learned judge had erred when he failed to appreciate that the respondents' case suffered a fatal flaw in not calling the second respondent as a witness to rebut the evidence of the appellants' witnesses. To support his contention, learned counsel relied heavily on the Federal Court's judgment of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751.

[32] The paragraphs of the judgment in *Takako Sakao* which learned counsel for the appellant relied on were these:

> Taking the first issue, it is significant that in the present instance the first respondent did not attend court nor give evidence nor take any part in the case. All she did was

merely to put forward arguments on why the appellant's caveat ought to be removed. She could have, if she wished, given evidence and challenged the appellant's evidence. But as already noted she refrained from doing that. *On the facts of this case, there were two persons who were privy to the terms of the arrangement in question and the details of the payments made and the purpose for which they were made: the appellant and the first respondent. The appellant took the witness stand and gave her evidence on the terms of the arrangement and about the sums of money she had provided and the purpose for which they were provided. No evidence was called on the part of the first respondent to refute the appellant's testimony.* Such an important omission was missed by both courts below.

[4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v Bachan Singh* [1931] 1 MC 125 at p 128:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true. (p 758)

[33] Applying the dicta from the Federal Court, learned counsel for the appellant submitted as follows:

> Unfortunately, the learned trial judge did precisely what Eliphinstone CJ said should not be done in the passage quoted with approval by the Federal Court. And he failed to do what was required of him. He analysed the evidence led by the plaintiff on critical issues regarding the second defendant's knowledge and participation upon these when ought not to have done so. He ought to have presumed for this purpose of the issue at hand that all the evidence led by the plaintiff upon the said issue was true. But, with respect, he failed to do that. Had he directed himself correctly he would, as any reasonable tribunal properly directing itself, have accepted the evidence the evidence of PW 4 and 9 (Tun Abdul Rahman) and held, as required by law, that there was a case to answer. He would have further held that the failure of the second defendant as a party to the action to give evidence apart from strengthening the plaintiff's case led to an adverse inference being drawn against the second defendant upon those issues in respect of which his evidence was crucial.

[34] Let us at this juncture say that this court is duty bound to follow the decisions of the apex court. Hence the only task which befalls unto us is simply to examine and determine whether the learned judge had failed to follow the dicta of the apex court of the land which we do so now.

[35] We start our deliberation by looking at the facts of *Takako* case which

concerns a claim by the appellant there for part ownership of a property registered in the name of the first respondent there. The claim was premised on the concept of trust. The appellant and the first respondent there were in partnership in a restaurant and they decided to purchase a property to operate the restaurant business. The appellant had provided a sum of RM194,610 for the purchase of the property, the consideration of which was in the sum of RM950,000. The first respondent registered the property in her name and then sold to a company owned by the second respondent who was the husband of the first respondent. In the trial only the appellant gave evidence as to how the property was purchased. In short the appellant's evidence was simply that there was an understanding between the parties that the property was to be owned jointly. The first respondent chose not to give evidence.

[36] The Federal Court in view of the lack of evidence to rebut the appellant's evidence held that judgment should have been given to the appellant. The Federal Court in coming to its decision relied on the case of *Wasakah Singh v Bachan Singh* [1931] 1 MC 125 and quoted with approval the dicta of Elphinstone CJ. If one looks at that quotation carefully, the learned Chief Justice talks of evidence which 'if it is believed'. What we take that to mean is simply the evidence of the appellant must reached a level that is to be believed. If the evidence of the appellant through cross examination by the respondents' counsel is devalued so to speak or not reached a level to be believed, then the trial judge is entitled to conclude that the appellant had not proved its case requiring the respondents to rebut. The burden of proof had not shifted at the end of the appellant's case at trial. That is what happened in the trial court here. The learned judge actually was very mindful of the principle of Takako case and this is evident when in his grounds made he said as follows:

> In coming to the above finding I have not overlooked the submission of the plaintiff that the Minister of Resource Planning/Chief Minister is a party having personal knowledge of the material facts in dispute and therefore the Minister should have been called to give his evidence failing which the court should draw an adverse inference against the defendants. Thus it was alleged by the plaintiff that the Minister knew the existence of the general plan, that he knew that Tun Abdul Rahman had an oral agreement and understanding with Datuk Nor Tahir regarding the general plan, that the Minister knew the ultimate beneficiaries of the plaintiff's licence, that Datuk Nor Tahir as Chairman of the Board of Management of STIDC briefed the Minister on the decision of the Board to refer the plaintiff's application for share transfer to the Minister. In support of its contention that the court should draw an adverse inference in the circumstances where the Minister did not come to give evidence, the plaintiff referred me to the decision of the Federal Court in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751.
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> I accept, as I am bound to, what was held by the Federal Court in *Takako Sakao*'s case, but with all respect I find that decision of no assistance to the plaintiff here, because I do not find that the evidential burden has shifted on the defendants to call the Minister to testify on the matters referred to as the plaintiff has been unable to

prove on a balance of probabilities a case for the Minister to answer in respect of each of the matters the Minister is alleged to have personal knowledge about as I have already made findings that there is no evidence produced by the plaintiff to show that the Minister in fact knew or had knowledge about them. Accordingly it is not appropriate on the facts of this case to draw an adverse inference against the defendants for not calling the Minister to testify.

[37] Our view is fortified by the recent decision of *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd* [2014] 3 MLJ 785; [2014] 3 CLJ 73 where the Federal Court faced with the proposition of Takako case said as follows:

> Learned counsel for the plaintiff submitted that based on the plaintiff's evidence the learned trial judge found it was sufficient to shift the legal burden to the defendant. The defendant elected not to lead any evidence to rebut the case of the appellant and took the position that there was no case to answer. Learned counsel for the plaintiff submitted that it was on that basis, and by reference to the applicable legal principles that the trial judge found as he did. It was therefore contended by the learned counsel for the plaintiff that the Court of Appeal had misdirected itself when it failed to appreciate the significance of the election on the part of the defendant. In other words, the Court of Appeal did not apply the law as stated in *Takako Sakao v Ng Pek Yuen & Anor*.....
>
> In the instant case the notes of proceeding showed that the defendant did take part in the trial. The plaintiff's sole witness was thoroughly cross-examined by the defence counsel. The trial went on and at the close of the plaintiff's case the defendant's counsel sought an adjournment to another date for the defendant's witness to attend. The learned trial judge refused the adjournment and the case was therefore closed without the defence offering any evidence. In our view the facts of this case can be distinguished from the facts in *Takako Sakao*.
>
> In our view the question of whether the parties were in accounting relationship involved a mixed question of fact and law. In its judgment the Court of Appeal had extensively dealt with the law relating to the duty to account under the common law. Having carefully considered the authorities on this issue the Court of Appeal came to the conclusion that on the evidence adduced by the plaintiff at the trial it was not sufficient in law to establish the case for duty to account. The Court of Appeal therefore did not interfere with the determination of fact by the learned trial judge. The learned trial judge's decision on this issue was reversed on a point of law and as such we agree with the submission of learned counsel for the defendant that the principles in *Takako Sakao* did not apply under the circumstances.

[38] It is our considered view that the Federal Court in *Solid Investments Ltd* had opined the principle in *Takako Sakao* case is subject to a plaintiff at the end of his or her case having overcome the burden of having proved a prima facie case and failing which the court is not required to enter judgment for the plaintiff should the defendant elect not to give any evidence. With that we move to the next area.

GENERAL PLAN AND ORAL AGREEMENT

[39] It is quite clear from the evidence in court that the foundation of the appellant's case is premised on the testimonial evidence of Tun Abdul Rahman which was this. With the purpose of assisting charitable bodies and the local natives economically, he devised a general plan of utilising the revenue from the timber resources of the state by applying from the State Government a forest licence to extracts timbers.

[40] This intention according to Tun Abdul Rahman was formed prior to his Chief Ministership from 7 July 1970 till 26 March 1981 and was discussed with the Supreme Council or State Cabinet on at least four occasions, which endorsed the general plan. This general plan according to him was discussed and made known to Datuk Nor Tahir the then Minister of Forestry, the STIDC Board (of which he was chairman while he was the Chief Minister), the then Director of Forests one Mr Joseph Yong who was a member of the STIDC Board, to persons in BINA, the Lembaga Kebajikan Melayu Miri, the Sibu mosque and some prominent Orang Ulu leaders in the Baram and Belaga area of Sarawak. And prior to his stepping down from his post as Chief Minister, he also said that he briefed the present Chief Minister about the general plan.

[41] The area of the timber lands for the timber licence had been discussed and agreed by the then Minister of Forestry Datuk Nor Tahir. The implementation of his general plan was then left to Datuk Nor Tahir, Datuk Kamal (PW 4), Norlia Abdul Rahman (PW 5), Hj Deli (PW 1) and others.

[42] To give credence to the evidence of Tun Abdul Rahman, Datuk Kamal Hussain (PW 4) and Norlia Abdul Rahman (PW 5) testified in court. As far as PW4's evidence was concerned, he related the instructions given by Tun Abdul Rahman to him in the presence of Datuk Nor Tahir to provide names of three companies for the issuance of the timber licence. Those three companies were Keruntum Sdn Bhd (which was granted a timber licence for the Baram area), Toucanet Sdn Bhd and Ketakung Sdn Bhd (which were granted timber licences in the Belaga area).

[43] As for Norlia Abdul Rahman (PW 5) it is her evidence that to implement the general plan as devised by Tun Abdul Rahman, she prepared and issued the circular resolutions of the plaintiff dated 14 December 1983 to transfer Datuk Deli's and Hj Louise Ali's shares to Solana Sdn Bhd and allot the controlling shares in the plaintiff to the following three parties:

Allotee	No. of Shares
Temenggong Baya Malang	500

POU (Baram) Sdn Bhd(representing the Orang Ulu in Baram)	2,500
Solana Sdn Bhd	6,998

[44] The final issuance of shares exercise resulted in the following persons becoming shareholders in Solana Sdn Bhd:

Allotee	No. of Shares
Louis Ali	700
Hj Deli	1,400
Lembaga Kebajikan Melayu Miri	1,400
Polycarp Enterprise Sdn Bhd	700
Lembaga Amanah Kebajikan Darul Falah	1,400
Anib Plantations Sdn Bhd	1,400
Crista Holdings Sdn Bhd	1,988
Datuk Shabuddin Mat	1,000
	9,998

[45] The learned judge after minutely examining the evidence of the appellant's witnesses found that 'at best the general plan was a personal initiative of Tun Abdul Rahman (PW 9) to which the government was not a party'. The learned judge gave seven broad grounds for his conclusion which can be summarised as follows:

(a) Failure on the part of the appellant to plead this 'general plan' in its pleadings at its earliest opportunity.

(b) The evidence shows that the conduct of the then Minister of Forest as chairman of STIDC is inconsistent to the existence of this general plan.

(c) The evidence of Hj Deli is inconsistent to the existence of the general plan.

(d) Solana Sdn Bhd the biggest shareholder in the appellant was not in existence when the licence was issued in 19 July 1983.

(e) Despite the fact that Tun Abdul Rahman was the Chief Minister from 7 July 1970 till 26 March 1981, there is no evidence to show that he had issued any licence that was to implement the general plan during his tenure which he could have easily done.

We now examine the judge's reasoning for the above grounds.

Reason 1 — Failure to plead at the earliest opportunity:

[46] The relevant pleading in respect of the general plan is set out in para 2(c)(iv) of its amended reply dated 18 May 1994 which read as follows:

> the said transfer and/or the said allotment of the controlling shares of the plaintiff as alleged in paragraph 1.6, were made in accordance with the oral agreement and understanding as required by the then Minister of Forests representing himself, the 1st and 3rd defendants when he considered and approved the plaintiff's application for the licence.

[47] The respondents had on 18 September 1990 filed an amended defence and in their para 1.6 had contended that the appellant had 'unlawfully and without authorisation, express or implied, issued and allotted or caused to be transferred' in the appellant. A reply to the amended defence was filed by the respondents on 22 September 1990.

[48] From the amended reply dated 18 May 1994, it mentioned the then Minister of Forest, one Datuk Nor Tahir, was fully aware of this general plan. Datuk Nor Tahir passed away on 27 November 1990 which meant that the appellant could have easily obtained a statement from him prior to the filing of the reply dated 22 September 1990. But no statement was obtained and hence no mention of the general plan in that reply and took four years after the death of Datuk Nor Tahir to plead this general plan in the amended reply dated 18 May 1994.

[49] We have no doubt in our mind that this contention of a 'general plan' forms a substantial and crucial part of the appellant's case. It could be said that its case succeeds or fails by that contention. That being the case, we find it incredulous that the appellant never pleaded it at the earliest opportunity in September 1990 where in fact the respondents in their defence had contended that the appellant had breached the law. It begs the question why did the appellant wait for almost four years after the death of Datuk Nor Tahir to make this allegation.

[50] Furthermore, Tun Abdul Rahman had testified that this general plan had been discussed in at least four cabinet meeting and the second respondent was fully aware of the oral agreement between Datuk Nor Tahir and Tun Abdul Rahman on the general plan. Hence we find that it is not reasonable that the appellant did not raise or disclose this in its pleading in September 1990 or even earlier.

[51] It is also not disputed that the appellant had been asked by the first respondent to show cause why its licence should not be cancelled for continued

breach of s 2(2) of the Forest Ordinance. Not only that, the appellant had also written to the Director of Forests and STIDC for consent for the transfer of shares. What that means that the appellant had several opportunities to make this allegation but it did not.

[52] We also see no explanation for this delay in making this allegation from the appellant in the cold prints of the record of appeal. This lack of explanation with respect can only lead to one conclusion and that is this allegation remains nothing more than a mere allegation.

Reason 2 — Conduct of the then Minister of Forest as chairman of STIDC is inconsistent to the existence of this general plan:

[53] As the Minister of Forest, Datuk Nor Tahir also headed the board of management of STIDC. If what was alleged were true, there was no reason for Datuk Nor Tahir, in dealing with the appellant's application for consent for the transfer of shares, not to inform the agreement he had made with Tun Abdul Rahman with the knowledge of the second respondent.

Reason 3 — Evidence of Hj Deli (PW1):

[54] It is the case of the appellant that the oral agreement and understanding was required by the Minister of Forest and it was on that basis that the licence was issued to the appellant. Hj Deli was alleged to be present when the licence was issued to the appellant and hence supposedly to be in know of the oral agreement. His testimony pointed to the contrary which is evident from this:

Q: I refer you to paragraph 2(c)(iv) of the third re-amended reply at page 105 of Encl 145 B. What is the oral agreement referred to therein in that paragraph?

A: I am not sure what do you mean by oral agreement.

Q: That oral agreement, if it existed, would have been made before the approval of the licence, am I right?

A: I am confused. The oral agreement is that are have to work together with other people and the concession is not ours alone.

Q: Who were the parties to this oral agreement?

A: Datuk Nor himself and Tun himself told us that it is not for us, if that was the oral agreement.

Q: Is Keruntum Sdn Bhd a party to this oral agreement?

A: Keruntum Sdn Bhd is as such is represented by the two of us, we only listened and we agreed to the oral agreement such as we work together with other people.

.....

Q: Was anybody else authorized by Keruntum Sdn Bhd to make agreement between Keruntum Sdn Bhd and the Government or the Minister?

A: When the 2 of us were there as shareholders, our task was only to apply for the said licence. There was no question of entering into agreement between Keruntum Sdn Bhd and other people.

Q: So, based on this answer, are you suggesting that even you and Hj Mohd Louis Ali cannot enter into agreement on behalf of Keruntum Sdn Bhd?

A: We have to get the licence first. That is the task.

Q: So, before the licence was issued you and Hj Mohd Louis Ali were not authorized to enter any agreements on behalf of Keruntum Sdn Bhd?

A: There was no agreement to be entered into because our task was to get the licence.

This evidence remained as spoken above, as no attempt was made to clarify in re-examination.

Reason 4 — Solana Sdn Bhd the biggest shareholder in the appellant was not in existence when the licence was issued in 19 July 1983.

[55] It was the appellant's case that the exercise in the transfer of shares in the appellant company as set out earlier was made premised on the oral agreement and understanding of the Minister Datuk Nor Tahir when he considered and approved the plaintiff's application for timber licence. The learned judge found this cannot be true and correctly so for the simple reason that on 14

December 1983 when Solana Sdn Bhd became the largest shareholder in the appellant, it did not exist on 22 July 1983 when the Minister of Forestry Datuk Nor Tahir approved the appellant's application as it was only incorporated on 24 November 1983. It is also part of the evidence of the appellant through Lucy Lao Puong Siong (PW 2) and PW5 that at no time was the Minister of Forestry was made aware of the pending incorporation of Solana Sdn Bhd or even thereafter. This showed conclusively that the general plan and the oral agreement were not in anyone's mind.

Reason 5 — General plan was a private initiative of Tun Abdul Rahman:

[56] The learned judge again gave various reasons for his conclusion and they were basically these. The general plan for charitable bodies during Tun Abdul Rahman's tenure as Chief Minister was done through the legislative assembly pursuant to legislations resulting to the setting up of Yayasan Sarawak and Sarawak Foundation Fund. Further during the tenure of the Tun Abdul Rahman's ministership as Chief Minister cum Minister of Forestry there was no evidence of setting up of a general plan for the benefit of the natives.

[57] Of immense significance is the learned judge's conclusion that even if there was a general plan, the appellant still had to comply with the legal requirement set out in s 2(2) of the Forests Ordinance which by the evidence of Tun Abdul Rahman himself the appellant's licence is regulated by s 2(2) of the Forests Ordinance. And as pointed out above, there was non-compliance to the aforesaid section and hence we agree with the learned judge, the defence of a general plan does not assist the appellant.

Issue 2.2

If there was such breach, whether the licence was rendered invalid and/or tainted with illegality?

[58] The learned judge answered in the affirmative and in our view for the correct reason. Section 2(2) of the Forests Ordinance expressly prohibits any transfer without the consent of the Director of Forestry and non-compliance of the same tantamounts to an illegal act which no court would allow any litigant to premise its cause of action on. The Forestry Ordinance is a piece of legislation aimed at protecting the natural resources of the state with the aim of ensuring that resources are properly nurtured and maintained. Hence it is in our view that public policy dictates that the courts to deem that the appellant cannot premised its action on a licence tainted with illegality.

Issue 3.1

Whether the first and second revocation were unlawful or contrary to law and should be set aside?

[59] The appellant on this issue relied on following factors. There was no oral hearing conducted prior to the second revocation. The decision was irrational and unreasonable in the circumstances. The decision is disproportionate or offended the principles of fairness. The decision was motivated by malice which amounted to public misfeasance.

[60] The learned judge in his grounds dealt with all the points raised in great details. We examined the manners in which the learned judge dealt with the points and found that he had applied the correct principle of law to the factual matrix correctly and we find no error in his grounds. Not only that, if we were to summarise his reasoning we may be doing a disservice to his well-crafted and reasoned judgment. Further and in any event, they were all findings of fact by the learned judge and as appellate court, the salutary rule is clear and that is there is no appellate interference unless it can be shown that these findings were perverse in that they were not premised on established evidence. That is not surely the case here. The learned judge examined every contention of law and facts raised by the appellant and answered them. Hence we concur with the decision of the learned judge. The reasons of the learned High Court judge are found at pp 131–158 of part A of the record of appeal.

Issue 3.2

Was the revocation of the plaintiff's timber licence done to serve a political purpose?

[61] From the evidence and submission of the appellant, it can be said that this contention was premised on the so called 'Ming Court' affair and the manner in which the appellant's timber licence was cancelled.

[62] The Ming Court affair concerned a move to get twenty eight State Assemblymen to cross the floor of the State Assembly in an attempt to remove the Chief Minister of the day namely the second respondent. A press conference by the group of politician opposed to the Chief Minister was held on 9 March 1987. On 10 March 1987, there was a press report which carried the headline 'Taib lashes out at 'wealth for power' attempts to destabilise and grab power'. On the same day, there was a meeting between the Chief Minister, Datuk Leo Chai (DW7), Hj Abdillah (DW9) and the then State Attorney General to discuss the termination of timber licences. On 11 March 1987, there was another press report quoting the Chief Minister as saying he was

watching the use of timber money to destabilise the State Government. It was under this backdrop that on 11 March 1987 the appellant's licence together with twenty five other licences were revoked. Hence, it was the contention of the appellant that the revocation of the appellant's timber licence was done for political purpose and done hurriedly.

[63] The learned judge did not accept the contention and in our view correct not to do so. The burden of proof is on the one who alleges and here the appellant carried that burden. It can be said the appellant was alleging that the sole reason for the cancellation of licences was to punish those who opposed the Chief Minister. However there are evidence which point to the contrary. PW1(Hj Deli) who is a self-confessed supporter of the move to oppose the Chief Minister and was involved in the Ming Court affair conceded that the company related to him did not have his license cancelled. That company is Usama Logging Sdn Bhd and it was asked directly to him during cross examination whether the licence of Usama was cancelled to which he said no.

[64] There is also no direct evidence in court that the Chief Minister knew about the Ming Court meeting prior to the cancellation of the appellant's license and to link the aforesaid cancellation to a political motive is mere conjecture. Further the 10 March 1987 meeting which cancelled the appellant's licence and twenty five others were to discuss a list of timber licenses whose shares have been transferred prepared by civil servants in the then Director of Forests (DW7) and Hj Abdillah (DW9). Again there is no evidence to show that these two persons knew that the alleged political motive behind the preparation of the list. Though their evidence were attacked by learned counsel for the appellant, the learned judge had in our view given reasons why they are reliable witnesses despite some inconsistencies in their evidence. It is trite law that minor inconsistency in evidence does not make the other evidence unbelievable. In this case, the learned judge analysed the inconsistencies and found them not to be serious inconsistencies. We see no error in his conclusion.

[65] One of the reasons relied by the learned judge for his decision was that the allegation of political motive was not referred at the earliest opportunity. In the words of the learned judge, he states as follows:

> Reverting to the issue at hand, having regard to my earlier finding that there was a complete absence of authorisation by the Director of Forests for the transfer of controlling shares in the plaintiff which constitutes a breach of s 2(2) of the Forests Ordinance, I find there were proper and valid grounds for the cancellation of the plaintiff's licence in August 1988. The plaintiff never raised or alleged political purpose or motive in its reply to show cause letter and never pleaded it in its original statement of claim. The Ming Court Affair occurred in March 1987, and if the political event had any bearing on the second revocation, it would have been raised

in the plaintiff's show cause letter in May 1988. I accordingly find that the second revocation was not affected by political motives or purposes as alleged.

[66] We see merits in the reasoning of the learned judge. Hence we see no reasons to depart from the findings of the learned judge.

Issue 4

Whether s 51A of the Forests Ordinance (as amended) is ultra vires art 8(1) of the Federal Constitution?

[67] The learned judge did not consider this issue as learned counsel for the appellant intimates to the learned judge that his decision can be made without recourse to the constitutional contention proffered.

Issue 5

If the court finds in favour of the plaintiff's claim for compensation, damage or loss, what is the quantum thereof?

[68] In view of the learned judge's findings, this issue was not deliberated by the learned judge.

CONCLUSION:

[69] This is an appeal mainly on findings of facts by the trial judge who naturally had the benefit of hearing testimonies and observing the demeanours of the witnesses. This benefit should not overlooked by an appellate tribunal. Unless and until the appellate tribunal are shown by the appellant that the learned judge had made findings which no reasonable tribunal would have made, there should no disturbance of the findings of the trial court.

[70] This is also a case where the trial judge had dealt with every points raised by the appellant and gave credible reasons for his conclusions. We have looked at those reasons and as stated above, we have not found any appealable errors on part of the learned judge.

[71] Accordingly we dismissed the appeal with costs to the respondents in the sum of RM30,000. We also ordered that the deposit is to be refunded to the appellant.

A *Appeal dismissed with costs RM 30,000.*

Reported by Afiq Mohamad Noor

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